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No. 83-1956

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THURSTON MOTOR LINES, a corporation,

Petitioner,

vs.

RANDY BRADY, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS BRADY, ET AL. IN OPPOSITION TO PETITION

MICHAEL A. SHEELY
Attorney for Respondents and Counsel of Record
418 Law Building
Charlotte, North Carolina 28202
(704) 376-6591

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REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE

INTRODUCTION

A Writ of Certiorari should not be granted in this case because: (a) The District Court and the Court of Appeals correctly applied well-established principles of law to the facts of the case; (b) There is no intercircuit conflict as asserted by the Petitioner; (c) The Petitioner has failed to advance a single valid reason for the granting of a Writ; (d) The Petition is a misstatement of the actions of the District and Appellate Courts; and (e) The Petition fails to describe all of the relevant evidence.

COUNTERSTATEMENT OF THE CASE

A. Actions Of The District Court.

This action was brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et

seq.,[1] and 42 U.S.C. § 1981. The respondents, black former employees of Petitioner, alleged that Petitioner engaged in racial discrimination in various aspects of its employment policies and practices. After conditionally certifiying a class, the District Court redefined the class at the conclusion of the trial (22).[2] The District Court found and concluded that some plaintiffs were entitled to relief: e.g., Brady, Pendergrass and Williams (retaliatory discharges) (74-75). Various claims were dismissed for failure of proof (76).

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[1] Hereinafter referred to as the Act.

[2] All undesignated numbers enclosed by parentheses refer to pages in the Appendix which accompanied Petitioner's Petition. Numbers designated as "Appendix at page ____" refer to the Appendix attached to the end of this Brief. This Appendix is necessary since the petitioner deleted relevant portions of the District Court's Findings from its Appendix.

Class discrimination was found in various practices, including termination (76-77). Injunctive relief was ordered (78-82). The District Court's findings and conclusions were based upon detailed findings of fact.

B. Opinion Of The Court Of Appeals On The First Appeal.

On the first appeal of this case, the appellate panel vacated the Judgment and remanded the case to the trial court (60-65). It did so because it could not determine whether the District Court correctly assessed the evidence within a framework of properly allocated burdens of proof.[3]

C. Actions Of The District Court After The Remand.

On remand the District Court empha-

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[3] In support of its action, the appellate panel cited this Court's opinion of Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

sized that the respondents had the burden of proof at the trial, and the Petitioner never had the burden to prove any matter. The District Court then reiterated its findings of no discrimination against the claims of seven individual claimants. It found for the remainder of the plaintiffs (51-59).

D. Opinion Of The Court Of Appeals On The Second Appeal.

On the second appeal of the case, the Appellate Court affirmed the District Court in all respects except for its reversal of the individual claims of Crawford and the class issue of initial job placement (3-38).[4] In its opinion,

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[4] The opinion is reported at 726 F.2d 136 (4th Cir. 1984). It should be noted that in addition to affirming the finding of a retaliatory discharge for Williams, the appellate panel, without dissent, affirmed similar findings for Brady and Pendergrass. In each instance (Brady, Pendergrass, and Williams), the reason advances by Petitioner was found to be pretextual by the District Court.

the Appellate Court: (i) affirmed the District Court's finding of a general policy and pattern of classwide discrimination which included the practices of involuntary terminations, promotions, transfers, job assignments, and provision of forklift assistance; (ii) held that the District Court, upon remand, correctly assessed the evidence within the framework of properly allocated burdens of proof (6-8); (iii) held that the District Court applied the principles of Burdine and U. S. Postal System v. Aikens, ____ U.S.____, 103 S.Ct. 1478 (1983) in an appropriate manner (8); (iv) affirmed the District Court's findings that two other individuals were subjected to retaliatory discharges; and (v) discussed the evidence of Williams in detail (3-21, 32-38; 726 F.2d 136-146).

E. Evidence Concerning The Retaliatory Discharge Of James Williams.

Petitioner contends that the finding of the retaliatory discharge of Williams is erroneous since there was no evidence to support said finding. It erroneously limits its discussion of the relevant evidence to the testimony of Williams and the supervisor who terminated him.

The evidence shows that (i) Williams was subjected to a retaliatory discharge; (ii) during the same general time period, two other persons (Brady and Pendergrass) were also terminated by Petitioner because they filed EEOC charges; (iii) there was a pattern of discrimination in involuntary terminations, including retaliatory discharges in response to the filing of employment discrimination charges (27, 74, 76-77, 98-100, 107-108) (Appendix at pp. 8-11);

and, (iv) there was a general policy and pattern of discrimination against blacks which included the employment practices of involuntary terminations, promotions, transfers, job assignments, and provision of forklift assistance (76-77; 726 F.2d at 146). The evidence for the foregoing is described below:

(a) Brady. The District Court, affirmed by the Appellate Court, found the following facts. Brady, a warehouseman, was employed by Thurston between February, 1973 and October, 1976. When Brady asked about a January, 1976 job vacancy, he was asked by the supervisor if he could get on the "soul brothers" (black employees). Brady filed an EEOC charge. After Brady was told he had a bright future, he was asked by management personnel of Petitioner to withdraw the charge. Brady

refused to do so. After his refusal Brady was consistently given more difficult trucks to unload than he had received prior to his refusal. He was terminated by the same men who asked him to withdraw his charge. Brady never received a warning until the day he was fired. At the time he was terminated, Brady was told by the terminal manager that he (Brady) had done what he needed to do, and they (Thurston) were doing what they had to do. The District Court found Petitioner's reasons to be pretextual and that Brady had been subjected to a retaliatory discharge. (Appendix at pp. 6 to 8; 726 F.2d at 141-142).

(b) Pendergrass. The District Court, affirmed by the Appellate Court, found the following facts. Pendergrass, a forklift driver/warehouseman, was employed by Thurston between August 4,

1974 and July 23, 1978. He filed his first EEOC charge in July, 1976. His desposition was taken on February 14, 1977; the terminal manager (Boyce Hudspeth) was present. Hudspeth signed the papers dealing with Pendergrass' termination. Pendergrass did not receive any warnings. He was terminated for alleged violation of Petitioner's attendance rules. He notified the supervisor the day before he would be absent. In effect, the three absences amounted to one excused absence (prior notice to supervisor) and two days where Pendergrass was marked absent because he failed to work overtime. The absences, excused at one point, were unexcused later on. The supervisors' testimony did not contradict Pendergrass' testimony that he told them he would be out, and the absences were excused. Pendergrass was tardy (1-3 minutes)

because he was in line to punch the time clock. Whites used by Petitioner to compare Pendergrass with were not comparable. The District Court found Petitioner's reasons to be pretextual and that Pendergrass had been subjected to a retaliatory discharge. Appendix at pp. 3 to 5; 726 F.2d at 143-144.

(c) James Williams. The District Court, affirmed by the Appellate Court, found the following facts. Williams was employed by Thurston between October 1, 1968 and January 7, 1978 as a warehouseman. Prior to January 1, 1978, Williams had never received a warning. After he filed an EEOC charge, Petitioner deposed Williams on February 14, 1977. Boyce Hudspeth, the terminal manager, was present. On January 7, 1978, Williams was given a trailer to unload; it had a red

tag on it. This tag meant that the unit was defective. Williams unloaded the trailer until he got to the headload (front of the trailer). Because of instructions, he was not to remove the headload. Williams saw the supervisor (Lee Flowe) about the headload because it would have to come off (due to the red tag). Williams asked Flowe to examine the headload. The trailer was directly across from the supervisor's shack. Flowe looked at the load and gave Williams another load. Forty-five minutes later, Flowe told Williams that Hudspeth had told him to fire Williams. Flowe corroborated Williams' testimony that: Williams asked him to look at the headload; he looked at it; and, he gave Williams another load. Flowe accused Williams of removing the red tag so he could avoid unloading the headload; Williams denied this. Flowe did not see

Williams remove the tag. Many persons were in the area of the warehouse where the trailer was located. Williams was given another assignment to either load or unload a truck as normally required. The District Court, evaluating credibility including demeanor among other things (Appendix at pp. 2-3), found that Williams proved pretext and that this discharge was retaliatory. Appendix at pp. 5-6; 726 F.2d at 144.

(d) Termination System. The District Court, affirmed by the Appellate Court, found the following facts. The terminal had a written set of rules of conduct. The use of written reprimands is within the discretion of each supervisor. There is no set pattern of discipline. It varies from one supervisor to another. One supervisor used a progressive system (oral, written, termination). Other supervisors

would terminate without prior warnings. The criteria was the common sense of the supervisor. The system is unwritten (98-101).

Between January 1, 1973 and May 31, 1977, there was a total of 195 involuntary teminations (146 white; 49 black) (100-101, 118). Utilizing the "standard deviation analysis" where the sample is 195, the black percentage of the terminal work force is 17.2%, the expected number is 33.54, the actual number is 49, the difference is 15.46, and the standard deviation is 5.27, the test result is a significant 2.93.[5]

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[5] See e.g., Hazlewood School District v. United States, 430 U.S. 299, 311-312, n. 17 (1977); Castaneda v. Partida, 430 U.S. 482, 496-497, n. 17 (1977); Lilly v. Harris-Teeter, 720 F.2d 326, 335-337, and n. 18 (4th Cir. 1984), cert. den., ___U.S.___ 104 S.Ct. 2154 (1984); and, EEOC v. American National Bank, 652 F.2d 1176, 1190-1193 (4th Cir. 1981), cert. denied, ___U.S.___, 103 S.Ct. 235 (1982).

Petitioner did not offer any class evidence concerning terminations. The only evidence it offered was in response to the individual claims. The statistics associated with terminations show that blacks were terminated involuntarily at a much higher rate than whites (100, 101, 118).

SUMMARY OF ARGUMENT

The lower courts, based upon substantial evidence of discrimination, appropriately applied the well-established law of this Court in finding and affirming that respondent Williams was terminated because he filed an EEOC charge. The Petitioner's review of the evidence in its Petition is erroneously limited to the testimony of respondent Williams and his supervisor. It fails to analyze the impact of relevant evidence concerning patterns of discrimination, statistics, and other individual

instances of retaliatory termination. The Petitioner advances arguments which fly in the face of the relevant evidence and contravene the well-established law of this Court. It asserts an intercircuit conflict where none exists. Petitioner seeks to avoid the consequences of its discriminatory acts by seeking interpretations of the law which should be rejected by this Court. Petitioner fails to advance a single valid reason for the issuance of a Writ.

ARGUMENT

A. The Court Of Appeals And District Court Properly Applied Well-Established Principles Of Law To The Facts.

The Petitioner only challenges the finding that respondent Williams was subjected to a retaliatory discharge and the underlying credibility decisions of the District Court. It must be noted

that the Petitioner does not challenge (i) the finding of a pattern and practice of discrimination in terminations, including retaliatory discharges in response to the filing of employment discrimination charges* (98-88); (ii) the findings of retaliatory discharges involving Brady and Pendergrass (74; Appendix at pp. 3-6);[6] (iii) the findings of class-wide discrimination (i.e., pattern and practice of discrimination) in terminations, job assignments, provision of forklift assistance to warehousemen, transfers and promotions (27-28, 76-77); and, the credibility decisions of the District Court, affirmed by the Court of Appeals, involving the promotion claim of Jerry Hunter and the class issues of job

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[6] See also 726 F.2d at 141-144.

* A person reading the Petition and not knowing anyting else about the case would not know of this finding.

job assignments and provision of fork-lift assistance.[7]

Petitioner's first argument is that the challenged finding is not supported by any evidence (i.e., it is "clearly erroneous"). It asserts that the error is twofold: (i) first, the evidence does not support the District Court's finding that Williams did not remove the tag; and (ii) secondly, even if the District Court was correct (i.e., not clearly erroneous) in this finding, it erred when it rejected as pretextual the second advanced reason of the Petitioner that it acted in good faith when it discharged Williams because it had a

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[7] See 726 F.2d at 142, 146. Petitioner claimed it offered two promotions to Hunter. Hunter denied this. The District Court resolved the credibibility issues in favor of Hunter. In reference to the issues of job assignments and forklift assistance, there was conflicting evidence. As pointed out by the Court of Appeals, the District Court as the trier of fact, was entitled to some evidence and not believe other evidence.

reasonable belief that he removed the tag. Petition For Certiorari (hereinafter Petition at _____) at 15-23.

The evidence supports the finding of the District Court. A detailed description is set forth above at pp. 6 to 14. There is a pattern of discrimination in terminations, including retaliatory discharges. There is a general policy of discrimination (27-28, 76-77). There were two other plaintiffs who were subjected to retaliatory discharges by the petitioner during the same general time period (one 15 months before Williams; the other 6 months after Williams). When Williams reached the headload, he called the attention of his supervisor to the load. He could not move it because of prior instructions. The headload would have to be removed because of the tag. The supervisor, in response to Williams'

request, examined the headload and assigned Williams to another truck. No one saw Williams remove the tag. Forty-five minutes later the supervisor fired Williams for removing the tag.

The Petitioner's first argument should be rejected for the following reasons.

(1) As demonstrated by the preceding paragraph, and pp. 6 to 14, supra, there is substantial evidence supporting the District Court's finding and the Court of Appeal's affirmation. The Petition only examines the testimony of Williams and his supervisor. Petitioner's description and analysis of the evidence utterly fails to consider the impact of the findings of (i) a discriminatory practice of terminations, including retaliatory discharges; (ii) a general pattern and

practice of discrimination;[8] and, (iii) the retaliatory discharges of two other plaintiffs upon Williams' claim. The Petition, by limiting its evidentiary discussion to the testimony of Williams and the supervisor, isolates Williams from the remainder of the pattern and practice case and examines his claim in a vacuum. This approach ignores the principle of law that when a pattern of discrimination is proven an inference arises that any particular employment decision, while the policy was in effect, was made pursuant to said practice. This creates a presumption of entitlement to relief which the employer must overcome. See e.g., International Brotherhood of Teamsters v. United

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[8] Covering the specific practices of involuntary terminations, including retaliatory discharges; promotions; transfers; job assignments; and, provision of forklift assistance.

States, 431 U.S. 324, 362 (1977). The Petition completely ignores the statistical evidence of discrimination in terminations (described above at pp. 13-14) as well as the evidence of a general policy of discrimination. Such evidence can be used to assist in the evaluation of a plaintiff's individual claim of discrimination. See e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-805 (1973).

> Other evidence that may be relevant to any showing of pretext includes . . . petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. 411 U.S. at 804-805.

The evidence shows a general policy of discrimination of which Williams' ter-

mination was but a piece. This was noted by the concurring opinion of Judge Phillips (37).

(ii) The District Court correctly applied the principles of Burdine, supra. This Court has specifically recognized that credibility resolutions play a role in determining whether a plaintiff has shown pretext:

> The plaintiff retains the burden of persuasion. She now must have the opportunity to show that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the Court that she has been the victim of intentional discrimination. She may succeed in this either directly . . . or indirectly by showing that the employer's proffered reason is unworthy of credence. Burdine, 450 U.S. at 256. (emphasis added)

The credibility determination, subject to the provisions of the clearly erroneous rule, is the sole province of the trier of fact. As stated by the Court

of Appeals, the District Court viewed the demeanor of the witnesses and chose to believe Williams. Given the evidentiary record in this case, these credibility determinations are not clearly erroneous. The District Court, as required by Burdine, placed the burden upon the respondents. Williams met this burden.

(iii) Petitioner asserts that there was no showing of pretext. Petitioner advanced two reasons for Williams' termination: his removal of the tag, and its reasonable good faith belief that he removed the tag. Its evidentiary analysis is limited to the testimony of Williams and his supervisor. Such an approach is erroneous. As recognized by this Court in Burdine, the determination of whether pretext is present is based upon an examination of all of the evidence. 450 U.S. at 255-256, text and

f.n. 10.[9] As stated above, this Court has recognized that evidence of statistics and a general policy of discrimination is relevant to a showing of pretext. McDonnell Douglas, supra, 411 U.S. at 804-805. As discussed above, Petitioner's evidentiary discussion considered only the testimony of Williams and the supervisor. The evidence of statistics, a general policy and pattern of discrimination (including terminations), and the two other individual findings of retaliatory discharge support the District Court's finding of pretext as well as its credibility determinations concerning the conflicts

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[9] It appears from Burdine, that evidence is examined as follows: (i) for the prima facie case one only looks at the plaintiff's evidence; (ii) for the articulation of a legitimate, non-discriminatory reason, one examines the employer's evidence; and, (iii) for the determination of whether pretext is present, one examines all of the evidence.

between the testimony of Williams and his supervisor. In short, Petitioner's termination of Williams " . . . conformed to the general policy of discrimination against blacks." McDonnell Douglas, supra, 411 U.S. at 805.

(iv) Petitioner states that:

> "It could be deemed that a prima facie case for Williams was put forward . . . But after that he presented nothing at all and left the defendant's explanation, of its good faith reasons for discharging him unchallenged. At that point the case for James Williams . . . completely failed." Petition at p. 30.

after setting forth verbatim the three stage test (prima facie case, articulation of legitimate, non-discriminatory reason, and opportunity to prove that the advanced reason was pretextual) of Burdine. This approach treats the Burdine test mechanically. According to Petitioner, if no evidence is offered by the plaintiff after the defendant produ-

ces its reason, no pretext is shown. Petitioner's mechanical approach has been rejected by this Court. See e.g., Teamsters, supra, 431 U.S. at 358; and McDonnell Douglas, supra, 411 U.S. at 802, n. 13. A plaintiff may put evidence on which shows that the advanced reason is pretextual while presenting a prima facie case. The important criterion is not when the evidence is put on, but whether it is put on at all. In this case this includes evidence of statistics, a showing of a general policy of discrimination and proof of similar individual instances of retaliatory discharge. Petitioner is simply erroneous in assserting that Williams offered nothing. He did not leave the Petitioner's reasons unchallenged. It is Petitioner's myopic view of the evidence and refusal to apply the correct legal principles that leave it as the

sole believer that its reasons were unchallenged by Williams.

(v) Petitioner's "bottom line" argument is that both the Court of Appeals and District Court misapplied the principles of Burdine. This argument is without merit. The Court of Appeals remanded the District Court's initial decision because it could not determine whether the principles of Burdine had been properly used by the District Court. The District Court specifically addressed the principles of Burdine upon remand and applied them correctly (51-59). The Court of Appeals correctly reviewed the District Court's application of Burdine (3-31; 726 F.2d 136). In fact the Court of Appeals, during its second review, reversed the favorable finding of one individual because the record evidence failed to establish the prohibited

motive. 726 F.2d at 145. In short, Burdine has been correctly applied by the lower courts. The purpose of the initial remand was to make sure that Burdine was applied correctly. This has been done. Further review is neither necessary nor justified.

(vi) Petitioner asserts that there is no proof of intentional discrimination (i.e., no prohibited motivation was shown) against Williams.[10] Petition at pp. 20-23. Motive is usually a matter of inference drawn from the evidence. It can be established by differential

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[10] In the event there is any question about the Court of Appeals' awareness of the motivation question during its review of the entire case, it should be noted that the claim of one individual was reversed because the record evidence failed to establish the prohibited motive. 726 F.2d at 145. This shows that the Court of Appeals was examining the evidence of all the claims to make sure that the record supported the District Court's findings on the question of motive.

treatment alone.[11] Motive can also be established by statistics in a disparate treatment case such as this.[12] This Court has stated that the plaintiff's burden to show pretext merges with the ultimate burden of persuading the trial court that the plaintiff had been the victim of intentional discrimination. Burdine, supra, 450 U.S. at 256. There is substantial evidence of intentional discrimination against Williams. A review of all of the evidence (Williams' testimony; his supervisor's corroborative testimony;[13] the statistics showing race to be a significant factor in terminations, general policy of discrimination, and two similar individual

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[11] Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-266 (1977).

[12] Teamsters, supra, 430 U.S. at 339, text and f.n. 20.

[13] See page 11, supra.

instances of retaliatory discharges during the same general time frame) supports the findings of pretext and intentional discrimination by the Petitioner.

(v) Petitioner's assertion that the finding of the retaliatory discharge of Williams is erroneous is a meritless challenge of the District Court's credibility decisions. One of the primary functions of any trier of fact is the decision of who, how much, and what to believe. Fact finding, including credibility resolutions of conflicting testimony, is the basic responsibility of the trial courts. See e.g., DeMarco v. United States, 415 U.S. 449 (1974). A trial judge is not bound to believe the testimony of the employer, even if it is uncontradicted and unimpeached.[14]

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[14] See e.g., Teamsters, supra, 431 U.S. at 342, n. 24; and Guzman v. Pichiril, 369 U.S. 698, 702-703 (1962).

Credibility involves demeanor assessments and "comprehends an overall evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Wright and Miller, Federal Practice and Procedure: Civil § 2586, Vol. 9 at 737 (West Publishing, 1971)(emphasis added). An Appellate Court must be especially reluctant to set aside a finding based on the trial judge's assessment of conflicting oral testimony. Id.

The Court of Appeals noted that the credibility decisions of the District Court in Williams' claim were appropriate in light of (i) witness demeanor; (ii) the context of all of the evidence; and (iii) Williams' testimony being buttressed by the finding that Petitioner engaged in a general pattern of discrimination of which

Williams' termination was one piece (32-38).

As stated above, this Court's opinion in Burdine allows a plaintiff to show that the employer's advanced reason is pretextual since it is unworthy of credence. 450 U.S. at 256. Neither side had direct evidence as to the red tag incident. Williams had his denial; Petitioner had its limited circumstancial evidence. Williams had no motive to remove the tag since he was given work immediately after asking Flowe to examine the headload. He could not escape any work. Flowe's testimony corroborated Williams in that Williams asked him to look at the headload, he looked at it, and gave Williams another assignment (Appendix at pp. 5-6; see page 11, supra). This gives credence to Williams' denial that he removed the red tag. The Petitioner, on the other hand,

had every motive to terminate him for his EEOC complaints. This conduct of Petitioner was consistent with its retaliatory discharges of two other plaintiffs and its general policy of discrimination (i.e., Petitioner's conduct "conformed to its general pattern of discrimination against blacks." McDonnell Douglas, supra, 411 U.S. at 805). The resolution of this conflict was well within the discretion of the District Court. The District Court had to resolve the conflict. The resolution had to be within the framework of all of the evidence since the determination of whether pretext is present is based upon an examination of all of the evidence. In light of the evidence, Petitioner's reasons were found unworthy of credence and, therefore, pretextual. The Petitioner's dual reasons of Williams' alleged removal of the tag and

its good faith belief that he removed the tag were appropriately rejected in light of all of the evidence that (i) Williams was more credible; (ii) Petitioner fired two other blacks for filing EEOC charges; (iii) Petitioner had engaged in a discriminatory pattern of terminations, including retaliatory discharges; and, (iv) Petitioner had engaged in a general pattern of discrimination. Petitioner's "good faith" in its employment decision could be and was appropriately not given credence by the District Court.

B. There Is No Intercircuit Conflict.

Petitioner argues that the Court of Appeals' decision conflicts with the First Circuit decision of Loeb v. Textron, 600 F.2d 1003, 1012, f.n. 6, 1014, 1015 (1st Cir. 1979) and the Eleventh Circuit decision of Moore v.

Sears, Roebuck and Company, 683 F.2d 1321, 1323 (11th Cir. 1981).[15] The Moore and Loeb courts stated that an employer's good faith belief that the plaintiff did something wrong (e.g., poor job performance) is sufficient reason for discharge (i.e., such a good faith belief is a legitimate, non-discriminatory reason) as long as the belief is not pretextual. These courts placed emphasis on the "good faith" belief as opposed to whether the employer's belief was correct. They stated that the employer was not required to prove that its belief was

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[15] Both of these cases are age discrimination cases which were tried by juries. The plaintiff lost in Moore. The plaintiff won in Loeb. The Loeb Court reversed the District Court because it had instructed the jury that the employer had to prove by the preponderance of the evidence that its actions were motivated by reasons other than age and were for good cause.

correct. The employer only had to show that its belief was in good faith.

These decisions do not conflict with the decision of the Court of Appeals in this case. The Court of Appeals did not say that an employer's good faith belief could not articulate a legitimate, non-discriminatory reason. It did not say that the employer must show that the stated reason was correct. It merely said, just as the Moore court did (683 F.2d at 1323, n. 4), that the "good faith belief" reason will not carry the day if it is shown to be pretextual. The only conflict is in the imagination of the Petitioner. The Petitioner seems to be asserting that "a good faith belief" defense is beyond the reach of pretext. Of course, such a

reason (like any other "legitimate, non-discriminatory" reason), if proven to be pretextual by a plaintiff, will fail. In the case at hand the Petitioner's "good faith belief" was appropriately found to be pretextual.

CONCLUSION

For the reasons given above, the Petitioner's request for a Writ should be denied. The actions of the District Court were entirely appropriate given the evidence in this case and the decisions of this Court. The case was reviewed by the Court of Appeals in an appropriate manner. It reversed the District Court when required to do so. The Petitioner has failed to give a single valid reason for the issuance of a Writ.

Respectfully submitted this the 18 day of June, 1984.

BY: Michael A. Sheely

MICHAEL A. SHEELY
Attorney for
Respondents and Counsel
of Record
418 Law Building
Charlotte, NC 28202
(704) 376-6591

OF COUNSEL:

SHELLEY BLUM
312 Law Building
Charlotte, NC 28202
(704) 332-3179

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil Action No. C-C-76-343

RANDY BRADY, JAMES WILLIAMS, MICHAEL FOX, JERRY HUNTER, FRANCIS PENDERGRASS, LACY MONDS, and CHRIS WATKINS, individually and on behalf of all others similarly situated,

Plaintiffs,

and

CURTIS CRAWFORD and LORENZO MOSELY,

Plaintiffs-Intervenors,

vs.

THURSTON MOTOR LINES, a corporation,

Defendant. /

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Michael A. Sheely, Sheely and Brooks, 418 Law Building, Charlotte, North Carolina 28202, and Shelley Blum, Raleigh, North Carolina, for plaintiffs.

William T. Cranfill, Jr. and J. W. Alexander, Blakeney Alexander & Machen, 3450 NCNB Plaza, Charlotte, North Caro-

lina 28280, for defendants.

Before James B. McMillan, District Judge, Western District of North Carolina,, Charlotte Division.

Tried: March 5-9, 1979, March 26, 27, 1979; Non-jury.

Decided: July 16,1979, by Memorandum of Decision on File.

This is an action brought pursuant to 42 U.S.C. § 2000e et seq. and 42 U.S.C. § 1981. The complaint was filed on December 10, 1976. The complaint, subsequent to motions by the plaintiffs and order of this Court, was amended on July 18, 1978, to allow the intervention of Curtiss (sic) Crawford and Lorenzo Mosely. Plaintiffs seek injunctive relief to remedy alleged unlawful employment practices and to provide specific relief for each individual who has suffered from these practices. Based on the evidence and the exhibits, and after

hearing and credibility of witnesses (and believability of their testimony), viewing the demeanor of witnesses, considering the interests of the witnesses and considering the arguments of counsel, the Court, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, makes the following:

FINDINGS OF FACT

Paragraphs 1-8 of these Findings have been deleted since they have no bearing on this appeal.

9. Plaintiff Francis Pendergrass was employed as a warehouseman at the Charlotte terminal in August, 1974. . . . (portion deleted because it has no bearing on this appeal). Defendant's discipline practices are subjective and vary greatly from supervisor to supervisor. . . . (portion deleted because of no bearing on this appeal). Pendergrass

filed his initial Equal Employment Opportunity Commission charge against defendant in late 1976.[5] Management of the Company knew of said charge since members of management were present at Pendergrass' deposition on February 14, 1977. In June, 1978, he was discharged on the grounds of excessive tardiness and three unexecused absences. Pendergrass received no warning about the sanction that might be imposed for tardiness during the period immediately preceding his discharge; his unexcused absences in fact amounted to one excused absence (prior verbal notice to his supervisor) and two days in which Pendergrass was marked absent because he failed to work overtime. Pendergrass is not entitled to recover on his claim of discriminatory discipline, but he is entitled to appropriate relief in second stage proceedings on his claim of

unlawful (retaliatory) discharge.

Paragraph 10 of the Findings deleted because it has no bearing on this appeal.

11. Plaintiff James Williams was employed by defendant from October, 1968 until his discharge in January, 1978. . . . (portion deleted because it has no bearing on this appeal). In January, 1978 Williams was discharged, reportedly for removing a red tag from a trailer used by defendant to signify the need for trailer repair. No one saw Williams remove the tag. Williams testified that he told his supervisor about the tag and was given another load to work on while the supervisor decided whether to have the tagged trailer completely unloaded. The supervisor testified that he was not reminded of the red tag earlier in the shift. Defendant suggested that Williams removed the tag to avoid un-

loading freight that was hard to maneuver; it is undisputed that Williams was immediately assigned another load of freight after he finished with the tagged trailer. Williams filed a charge with the Equal Employment Opportunity Commission on July 28, 1976, and a second charge in October, 1976,[6] and Mangement of the Company knew of said charge since some of its members were present at Williams' deposition on February 14, 1977 and September 7, 1977. He received a "right to sue" letter in February, 1977. Williams is entitled to appropriate relief on his claim of being subjected to an unlawful (retaliatory) discharge.

12. Plaintiff Randy Brady was employed in the terminal facility from February, 1973 until his discharge in October, 1976. . . . (portion of findng dealing with promotion/transfer claims

deleted since not relevant to appeal). In January, 1976 Brady expressed an interest in another line foreman position that became available. In response to the inquiry, his supervisor asked him if he "could get on the soul brothers." The position was filled by a white employee, Leonard Knox, who had less warehouse experience than Brady. In February, 1976 Brady filed a charge against defendant with the Equal Employment Opportunity Commission.[7] In April, 1976 Brady was called to a meeting with management personnel and was asked to withdraw the EEOC charges. After the meeting, he was given the hardest dock assignments consistently. In October, 1976 Brady was terminated, reportedly for "poor attendance." The terminal manager at the time told Brady he was doing what he had to do, just as Brady had done what he had to do.

. . . (portion deleted since it has no bearing on the appeal). Brady is entitled to appropriate individual relief for unlawful discrimination in the denial of the January, 1976 promotion to line foreman and for discriminatory (retaliatory) discharge.

Paragraphs 13-35 of the Findings have been deleted since they have no bearing on this appeal.

36. Plaintiffs have established a prima facie case of discrimination in connection with terminations (actual and constructive), specifically including retaliatory discharge in response to the filing of employment discrimination charges with the Equal Employment Opportunity Commission. The Company did not rebut this case. This is established by the individual cases of Messrs. Pendergrass, Williams, Crawford, and Brady, as well as statistical[36] and

other evidence. Plaintiffs' Trial Exhibit 34 offers numerous examples of whites receiving warnings for absenteeism prior to their termination, while Pendergrass did not receive any such warnings. The testimony of William Hunt shows that he utilized a progressive system of discipline. The testimony of Messrs. Thurston and Cotzine indicated that the system was within the discretion of the supervisor, utilized "common sense" as a guideline, and was not reduced to written form. The system utilized by the terminal was essentially a group of subsystems, each one dependent upon the supervisor utilizing it. Such a system can range from the progressive system of Hunt to the whims of another supervisor. "Common sense" as the only guide can lead to, and in this case, did lead to, uneven application of discipline, including discharge.

The statistics bear this out in that a greater proportion of the black work force was subjected to involuntary terminations.

% OF WORK FORCE INVOLUNTARILY TERMINATED

YEAR	% B	% W
1973	6.9	3.3
1974	14.5	6.0
1975	12.6	12.9
1976	22.8	13.9

(Plaintiff's Trial Exhibit 5)

and black involuntary terminations were a much higher percentage of all black terminations than the corresponding percentage for whites:

% OF TERMINATIONS WHICH WERE INVOLUNTARY

YEAR	% B	% W
1973	15.8	9.6
1974	43.5	26.0
1975	57.9	50.0
1976	66.7	39.1
1977	50.0	17.6

(Plaintiffs' Trial Exhibit 5)

A system without written guidelines, and which depends upon a subjective "common sense" as the controlling factor, is discriminatory when it results in the pattern shown by the statistics.

The remaining Findings and footnotes 1-35 have been deleted since they have no bearing on this appeal.